Office Supreme Court U. S.
FILED
JAN 28 1901
JAMES H. McKENNEY

No. 35.

Brf. of Guthrie, Dickinson, Mc
& Gale for P. C. (on mo.)

Mississippi Tax Cases.

Filed Jan. 28, 1901.

Supreme Court of the United States.

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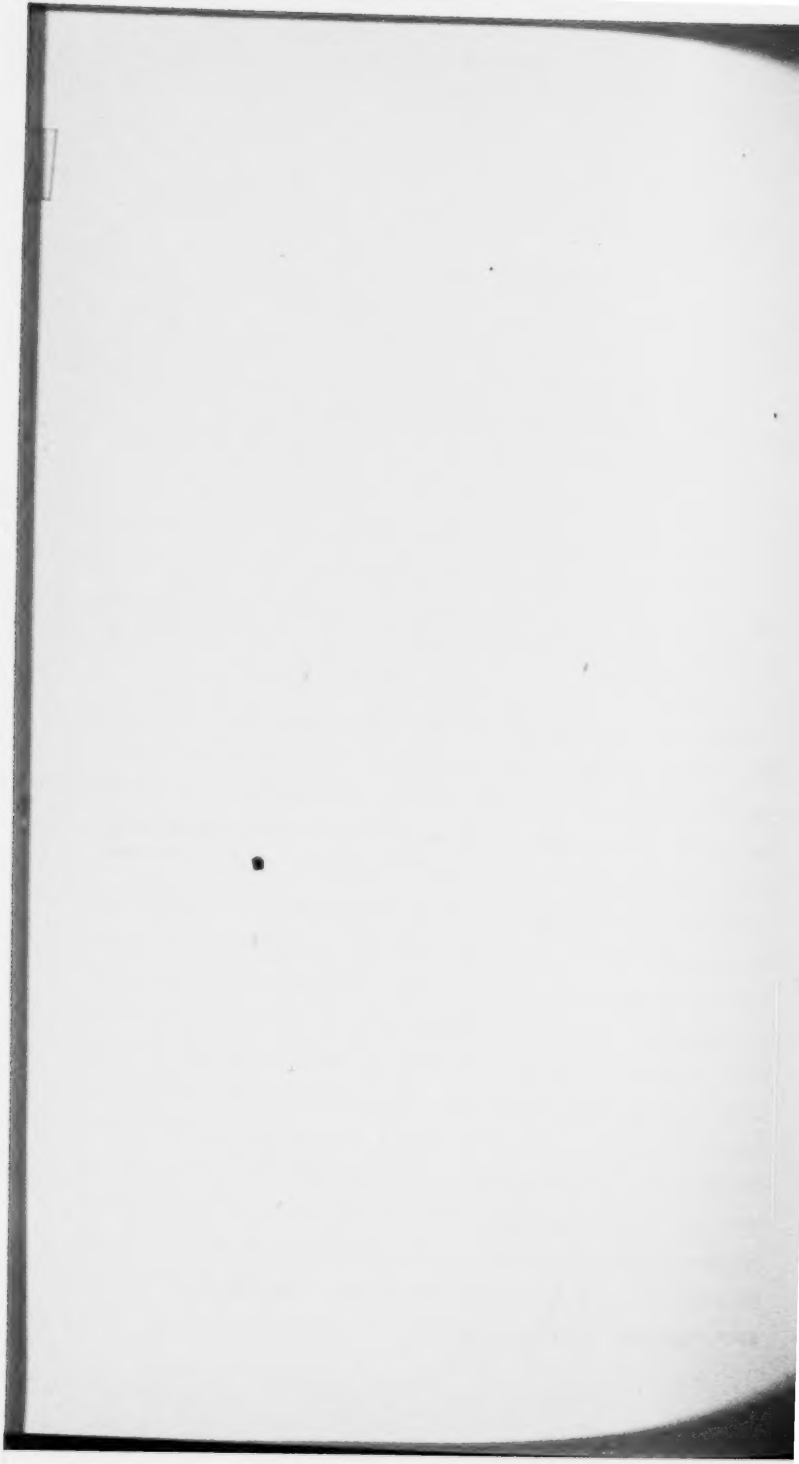
THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.,
Plaintiffs in error,
vs.
WIRT ADAMS, State Revenue Agent.

In error to the Supreme Court of the State of Mississippi.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR IN SUPPORT OF PETITION FOR A REHEARING OR FOR A MODIFICATION OF THE JUDGMENT RENDERED JANUARY 7, 1901.

WILLIAM D. GUTHRIE,
J. M. DICKINSON,
EDWARD MAYES,
NOEL GALE,
For plaintiffs in error.

WASHINGTON, January 28, 1901.



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The court has rested its decision of this case upon the effect of the consolidation of October 24, 1892, and therefore has not found it necessary to pass upon the original validity of the contract rights of commutation or exemption claimed on behalf of the plaintiffs in error. The record, however, shows (p. 2) that the taxes for the year 1892, which make up part of the judgment affirmed, had been completely levied and assessed on September 22, 1892, and that the claim of the state, if any, had fully accrued at least one month before the articles of consolidation were executed (*id.* p. 14). The judgment therefore gives to the consolidation a retrospective effect. Under these circumstances, counsel for the plaintiffs in error beg leave to submit the following considerations in support of their petition for a rehearing as to the taxes for 1892 or for a modification of the judgment of affirmance rendered herein.

I.

THE PLAINTIFFS IN ERROR ARE ENTITLED TO THE BENEFIT OF THE CONTRACT OF COMMUTATION OR EXEMPTION IN RESPECT OF THE TAXES FOR THE YEAR 1892.

Whether the provisions of section 21 of the charter of the Mobile and Northwestern Railroad Company are to be considered as creating a right of commutation or appropriation of taxes, or as conferring an absolute exemption, that right of commutation or exemption was a valid grant within the constitutional power of the legislature and had already attached to the taxes for the year 1892 before the consolidation of October 24, 1892. For many years before the adoption of the Mississippi constitution of 1869 it had been customary for the legislature in granting corporate charters to expressly reserve the right or power to tax the property of the corporations thus created (see pp. IV.–V. of appendix to our brief in No. 80, October Term, 1900). The framers of the constitution of 1869, with intent to make this reservation of power generally applicable to corporations, declared that corporate property should be "subject to taxation the same as that of individuals;" but that constitution did not contain any inhibition of specific corporate exemptions—much less of legislative contracts for commutation or appropriation of taxes. For twelve years prior to the granting of the charter here in question—that is, continuously after the adoption of the constitution of 1869—it had been the practice of the legislature to grant absolute exemptions from taxation to corporations, and one hundred and twenty such exemptions were granted during the period between 1870 and 1890 (pp. XVII–XXI of appendix to our brief on the merits in this case). In addition to such absolute exemptions, the legislature had, prior to applying the provisions of section 21 to the

L., N. O. & T. Company, granted more than fifty corporate charters containing agreements for the commutation or appropriation of taxes similar to that here involved (*id.* pp. XV–XVII).

The validity of exemptions under the constitution of 1869 was uniformly recognized and upheld by the supreme court of the state. As early as 1878, six years before the provisions of section 21 were applied to the L., N. O. & T. Company, that court in the case of *Mississippi Mills* v. *Cook*, 56 Miss. 40, 52, construing the above-mentioned provision of the constitution of 1869, determined that it did not of itself prohibit exemptions, but only declared the liability of corporations to taxation subject to the control of the legislature. This authoritative construction of the constitution of 1869, subsequently reiterated, became as much a part of that instrument as the text itself (*Douglass* v. *County of Pike*, 101 U. S. 677, 686). The decision in *Mississippi Mills* v. *Cook*, *supra*, was followed without break for twenty years, as will be seen by reference to the following cases involving in one way or another the question of the validity of exemptions under the constitution of 1869: *McCulloch et al.* v. *Stone*, 64 Miss. 378, 392; *Y. & M. V. R. R. Co.* v. *Thomas et al.*, 65 Miss. 553, 562; *Vicksburg Bank* v. *Morrell*, 67 Miss. 47, 56; *Attala Co.* v. *Kelly*, 68 Miss. 40, 44; *L., N. O. & T. Ry. Co.* v. *Taylor*, *id.* 361, 363; *Railroad Co.* v. *Lambert*, 70 Miss. 779, 786. There was no hint of any change in the judicial view until the decision of the state supreme court in this case; and this court in reviewing that decision has refrained from determining the constitutional question.

The acquiescence of all departments of the state government in this view of the validity of such exemptions was universal. In addition to the uniform and continuous

usage of the legislative and judicial departments, the executive officers of the state, including its law officers, without exception, for fully twenty years adopted the same construction and consistently acted upon it.

This long continued practice of the legislative, executive and judicial departments is most convincing as to the legality of these commutations or exemptions. No rule of interpretation is better settled in this court than that which gives the greatest weight to such practice and interpretation. In *The Laura*, 114 U. S. 411, 416, Mr. Justice Harlan, citing *Stuart* v. *Laird*, 1 Cranch, 299, 308, said:

> "Touching the objection now raised as to the constitutionality of the legislation in question, it is sufficient to say, as was said in an early case, that the practice and acquiescence under it, 'commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.'"

In *Hawkins et al.* v. *Caroll Co.* 50 Miss. 735, 752 (decided in 1874), Simrall, J., said:

> "At the time of the adoption of the constitution the power of the legistature to authorize municipal aid to these enterprises, coupled with the delegated authority of taxation, was well established, both by legislative precedents and judicial decisions in this and the other states."

See, also, *Ogden* v. *Saunders*, 12 Wheat. 213, 290; *Briscoe* v. *The Bank of the Commonwealth of Kentucky*, 11 Pet. 257, 318; *Prigg* v. *The Commonwealth of Pennsylvania*, 16 Pet. 539, 620; *Cooley* v. *Board of Wardens of Port of Philadelphia et. al.* 12 How. 299, 315; *Auffmordt* v. *Hedden*, 137 U. S. 310, 329; *Schell's Executors* v. *Fauché*, 138 U. S. 562, 572; *Field* v. *Clark*, 143 U. S. 649, 691; *McPherson* v. *Blacker*, 146 U. S. 1, 27; *Kennedy* v. *Gies*,

25 Mich. 83, 92; *State* v. *Luther*, 56 Minn. 156, 164; *Emery* v. *Reed*, 65 Cal. 351.

The Mississippi authorities are to the same effect: *Daily* v. *Swope, Guardian, etc.* 47 Miss. 367, 383; *French* v. *The State*, 52 Miss. 759, 762; *Shotwell* v. *Covington*, 69 Miss. 735, 738; *Chrisman* v. *Brookhaven*, 70 Miss. 477, 483.

At the time of the adoption of the constitution of 1890, the validity of exemptions was so firmly established in Mississippi that there can be no reasonable doubt as to what the common understanding of the framers of that constitution was upon the subject. That constitution provided (section 181):

> "Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature."

It is clear that this provision of the new constitution was intended to apply to and preserve rights of commutation or exemption such as that involved in the case at bar, from the fact that, except in the case of two or three small private schools, altogether insignificant in the fiscal system of the state, there were in 1890 no corporations entitled to exemptions which had been granted prior to 1869. Exemptions had been commonly granted before that time, but they had either never been availed of, or had terminated by expiration of the period for which they were granted, or had lapsed for other cause. Practically all corporate exemptions, therefore, such as are mentioned in section 181 of the new constitution, must necessarily have been granted under the constitution of 1869, and these were the exemptions which the framers of the constitution of 1890 had in mind and

which they intended to protect in good faith. Surely, the use of the word *legally* was not intended to deprive the section of all practical force and effect or to conceal a snare.

The legality of exemptions in Mississippi under the constitution of 1869 had been declared and upheld prior to 1890 by at least four decisions of the highest tribunal of the state. The constitution of 1890, therefore, referred to a class of exemptions sanctioned by the legislative practice of many years under the constitution in force, permitted by the universally accepted construction of that constitution, and confirmed and declared by the highest state court. These were the exemptions "to which corporations are legally entitled." The language of section 181 fairly applies to no other subject matter.

No more persuasive union of all canons of constitutional construction and interpretation can well be imagined than are found in this case as to the legislative power to grant exemptions, namely: (1) A common course of legislation evincing the universally entertained view of corporate liability to taxation, and recognizing the necessity for providing that corporations should be "subject to taxation," which view continued for many years; (2) the adoption of that view of liability to taxation in the constitution of 1869; (3) a judicial inquiry into the validity of claims for exemption, and a judicial declaration of their validity; (4) common and long-continued legislative recognition, under the constitution of 1869, of the legality of commutations or appropriations and exemptions, and repeated refusals by the legislature to repeal such provisions in corporate charters; (5) continuous acquiescence by the executive department and by those charged with the collection of taxes; and (6) a subsequent constitution, dealing with existing exemptions necessarily created

under the constitution of 1869, and confirming those to which corporations were "legally entitled." In truth, the convention which adopted the constitution of 1890 could not have indicated more plainly that it meant to confirm and continue such rights as that claimed by these plaintiffs in error if it had specifically named and included them in that instrument.

Stearnes v. Minnesota, 179 U.S. 223, 232.

II.

IF A REHEARING AS TO THE TAXES FOR 1892 IS DEEMED IMPRACTICABLE, THEN THE PROPER REMEDY OF THE PLAINTIFF IN ERROR IS AN APPLICATION FOR A MODIFICATION OF THE JUDGMENT IN THIS COURT.

The case of *Supervisors* v. *Stanley*, 105 U. S. 305, 316, affords sufficient authority for this application. In that case, the court, as it supposed, had disposed of the whole case, as shown by the record, and had directed a final judgment. Upon a subsequent suggestion, however, that certain issues had not been disposed of upon the trial in the court below, the court examined the record, and, it appearing that the complaint contained averments which might afford a solid ground of recovery, and which manifestly had not been passed upon before, either by the trial court or by the appellate court, this court (p. 318) directed that its judgment be "so far modified as to permit the court below, in its discretion, to hear evidence on that point, and, if necessary, to allow an amendment of the pleading, to present it properly." In the case at bar the court is not asked to go so far. Its attention is requested to a fact, indisputably appearing on the face of the record here, which, it is submitted, makes it not only proper, but necessary, in the determination of the rights of the parties, that a decision should be had upon the validity of the contract rights claimed on behalf of the plaintiffs in error. The relief asked does not

involve further proceedings in any other court, because, in any event, the judgment rendered here will finally determine the issues, and, if the plaintiffs in error should be successful in their claim to be relieved from the judgment so far as it includes the taxes of 1892, it would only be necessary to reverse the judgment of the state court as to the taxes for that year. The question presented to the court, if this application be granted, has already been fully argued at the bar and in the briefs submitted, and any further discussion would only be necessary if desired by the court. In that event, the proceeding might partake of the charac er of a rehearing, but at present it is conceived that, upon the face of the record and the opinion of the court, the application for a modification of the judgment will be granted so that the judgment shall be affirmed as to the taxes for 1893 to 1897 inclusive and reversed as to the taxes for the year 1892.

Washington, January 28, 1901.

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